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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1

ERICH F. MEITZNER AND JAMES A. OLINE,
Petitioners,

v.

MORRIS MINDICK AND JERRY J. SVARZ,
Respondents.

REPLY BRIEF

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REPLY BRIEF

This Reply Brief is addressed to arguments first raised in respondents' Brief in Oppposition to Petition for Writ of Certiorari.

As in the proceeding before the CCPA, respondents do not challenge the finding below that petitioners are the first inventors based on proofs, but rather limit their arguments to an irrelevant point of law, a gross mischaracterization of the proceeding below and the setting up of a strawman, all in a transparent attempt at mesmerizing the Court with such irrelevancies so that respondents' patent will continue as a legal monopoly even though the patentees are not the first inventors.

Considering the points in the order raised by respondents, respondents' discussion of the conflict in the de-

cisions bears no relation to the instant petition. Thus, the case of Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971), cited at page 2 of respondents' Brief in Opposition is inapposite because there has been no decision by any Court or any other tribunal that, based on proof, petitioners, Meitzner et al, are not the first inventor.

In erroneously stating that ". . . the sole issue before the PTO and CCPA was whether *petitioners* were entitled to a patent . . .", respondents' Brief in Opposition attempts, by an outright misstatement of law and fact, to bury the actual issue raised in the Petition for Writ. The statute (135 U.S.C. 135(a)) clearly defines the issue in an interference as one of priority:

> "The question of priority of invention shall be determined. . ."

The *decision* of the PTO was:

> "Priority of invention . . . is awarded to Morris Mindick and Jerry J. Svarz. . ."

The *decision* of the CCPA was to the same effect:

> "The junior party . . . appeals from the decision . . . awarding priority of the invention . . . to the senior party. . . We affirm"

As noted in the Petition, the result of these decisions is that respondents, although found not to be the first inventors, are allowed to continue to claim in their patent the subject matter at issue and to force the public to bear the burden of an unwarranted monopoly with the presumption of validity strengthened by the proceedings below. Nor would reversal auotmatically issue a patent to petitioners since ex parte prosecution would follow such a decision on priority, allowing the PTO to refuse a patent to petitioners on the basis of estoppel.

Finally, in setting up a strawman in Dr. Wen, respondents would have the Court conclude the issue is moot. The basic fallacy in respondents' assertion is that the facts of Dr. Wen's activities as outlined in respondents' Brief in Opposition were before the PTO (and the CCPA) and the PTO still concluded (left undisturbed by CCPA):

> ". . . we would award priority, based on the proofs alone, as follows:
>
> (1) counts 1 through 4 to Meitzner . . ." (App. 31a)[1]

Neither logic nor law is advanced by respondents to support their claim of mootness. As can be seen above, none is possible.

Respondents' Brief in Opposition fails to come to grips with the compelling public issue raised in the Petition for Writ and, more specifically, fails to identify any authority or provide any plausible reasons for burdening the public with a patent monopoly awarded to one found not to be the first inventor merely because the true first inventor may be subject to a technical estoppel.

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[1] The PTO noted some definite problems in regarding Dr. Wen as a coinventor with Mindick et al. Thus, the Board stated:

> ". . . Wen also stated that it was his general practice to design his own experiments, including selection of the 'conditions of reaction', 'the materials,' and 'the proportions of the materials' (Record for Mindick, pp. 230-231). Wen never stated that Mindick told him to use 40% or 55% as shown in the RW resins in the table." (App. 27a)

CONCLUSION

The Petition for a Writ of Certiorari should be granted so that this Court can consider the legality of the present PTO practice of gratuitously granting patent monopolies to those who are not first inventors where no abandonment, suppression or concealment by the true first inventor is evident.

Respectfully submitted,

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